



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT

For Meeting Date: November 14, 2002

SUBJECT: Item 13 – Issuance of an Administrative Penalty to Diamond Quarry, CA Mine ID #91-09-0003, Loring Brunius, Owner/Operator; El Dorado County, for Failure to Comply with an Order to Comply Issued July 11, 2002, for Failure to Correct Mine Site Conditions Not in Compliance with the Approved Reclamation Plan

BACKGROUND: At its regular business meeting on March 27, 2002, the State Mining and Geology Board (SMGB) determined to issue to Diamond Quarry (Quarry) a Notice of Violation (NOV) pursuant to Public Resources Code (PRC) §2774.1. The NOV cited the Quarry's failure to correct six long standing violations of the operator's reclamation plan. The continuance of these violations was confirmed by an on-site inspection of the Quarry on February 7, 2002.

According to the NOV, which was received by the operator's agent on April 1, 2002, the operator was provided 30 days from receipt of the NOV in which to correct the cited deficiencies or the operator may be subject to an Order to Comply from the SMGB.

On May 9, 2002 at its regular business meeting, the SMGB adopted findings that the Quarry was continuing to operate out of compliance and in violation of its reclamation plan, El Dorado County Code Chapter 8.36, and the requirements of the Surface Mining and Reclamation Act of 1975.

Based on the operator's lack of response to the NOV and the hearing on May 9, 2002, the SMGB at its regular business meeting on July 11, 2002 issued to the Quarry pursuant to its authority under PRC §2774.1 an Order to Comply. The Order's effective date is September 12, 2002 at 6:00 P. M. The Order was received by the Quarry's agent on July 17, 2002.

In addition to this Order, the Quarry is subject to the following Orders issued by the SMGB;

- July 20, 2001, Order to Comply: ordered to correct violations
- August 16, 2001, Administrative Penalty for failure to comply with July 20th Order; penalty amounts accruing;
- December 13, 2001, Administrative Penalty for failure to maintain an adequate financial assurance; penalty amounts accruing;
- July 11, 2002, Cease and Desist Order for failure to possess a financial assurance.

EXECUTIVE OFFICER'S REPORT

EXECUTIVE OFFICER'S ANALYSIS OF ADMINISTRATIVE PENALTY CRITERIA: Pursuant to PRC §2774.1(c), the SMGB must take under consideration several criteria when setting the amount of administrative penalty. These criteria are discussed below:

A. Nature & Extent (*Degree and substance of violation*)

1. Is the case one of total failure to provide approved reclamation plans or financial assurances, or to report and pay fees? Is the failure one of intentional delay and obfuscation, or refusal to comply?
2. Is the case one of partial failure to provide approved documentation, or pay partial fees? Is the failure a "clerical error", or a misunderstanding of what was required and when?

Analysis: The Quarry has been made aware of violations to its reclamation plan by the SMGB on numerous occasions, including public hearings and through written correspondence, since February 2001. The conduct of the operator manifests an intentional and willful disregard for the law and refusal to comply.

B. Circumstances (*Outside influences*) What are the circumstances affecting the operator's failure to comply?

1. Were the circumstances avoidable had the operator acted on his/her own behalf? How responsible was the operator in attempting to control, to take charge of, "circumstances" that directly affected his/her business?
 - (a) Should the appellant had a more active role in directing hired consultants?
 - (b) Should the appellant had a more active role in obtaining responses from government agencies?
2. Were the circumstances particularly unique, or were they encountered by other operators and could have been anticipated?
 - (a) How many other surface mines are already in compliance within the lead agency?
 - (b) Is it reasonable to assume that the appellant should have been aware of circumstances encountered by other compliant operators?

Analysis: The evidence clearly substantiates that the Quarry acted willfully on its own behalf to not take corrective actions. The issue faced by the Quarry is not unlike that faced by every other surface mine operation in the State: the requirement to remain within the approved scope of its reclamation plan. The Quarry was notified and made aware of violations to its reclamation plan by the SMGB at hearings since February, 2001. Many of these hearings were attended by representatives of the Quarry. The Quarry was formally noticed of the violations following an inspection of the mine on February 7, 2002 and the requirement to

correct specific violations of its reclamation plan with a Notice of Violation issued on March 27, 2002, and again in public session on May 9, 2002.

C. Gravity (*Financial costs or economic losses to others*)

1. What financial or economic burden has the lead agency had to bear as a result of this operator not complying?
 - (a) Has the lead agency had to expend excessive funds (personnel time and costs) to try to bring the appellant into compliance, thus increasing the amount of fees to be collected from the compliant operators to pay for the local SMARA administration?
 - (b) Has the lead agency had to redirect personnel away from other tasks, thereby delaying the implementation of those tasks and services, in order to deal with the non-compliant operator?

Analysis: The record clearly demonstrates that the staffs of the County of El Dorado, the Department of Conservation, the Office of the Attorney General, and the SMGB have devoted many hundreds of hours of personnel time attempting to bring the Quarry into compliance with its approved reclamation plan and with SMARA. Staff and resources from these organizations have been diverted from other important tasks because of the Quarry's willful disregard for the law and refusal of the Quarry to comply with orders issued by these agencies.

D. Prior Violations (*History of compliance / cooperation*)

1. Has the operator received Administrative Penalties in the past?
 - (a) For the same violation at the same or a different operation?
 - (b) For a different violation at the same or different operation?
2. Has the appellant been cooperative regarding past violations? Has the appellant paid previous penalties and made necessary corrections, or had to be referred to the Attorney General's Office for failure to respond ?

Analysis: The Quarry has a long history of noncompliance and non-cooperation. To wit the following:

9/24/91 -- Department of Conservation informs quarry of requirement for reclamation plan; DOC needs copy. The Quarry finally obtains a reclamation plan in August 1997 (6 years later).

1/28/93 -- Department of Conservation issues administrative penalty for failure to file 1991 Annual Report.

6/7/93 – SMGB denies financial assurance appeal because quarry has no approved reclamation plan upon which to base estimates.

3/17/94 – DOC issues administrative penalty for failure to file 1992 Annual Report.

6/28/95 -- The DOC is granted a Stipulated Judgment (Sacramento Superior Court) against the Quarry in the amount of \$70,000 for penalties for failure to file annual reports, pay annual fees, and failure to submit reclamation plan and financial assurances.

12/17/96 – DOC sends notice to Quarry of failure to comply with Stipulated Judgment.

3/12/97 – DOC issues Cease Mining Order to operator for failure to have approved reclamation plan and financial assurance.

4/15/97 – SMGB upholds DOC Cease Mining Order.

10/1/97 – El Dorado County issues Notice of Violation to Quarry for failing to post financial assurances within 15 days of approval of reclamation plan, failed to sign indemnity papers for County, and violation of Conditions of Approval. This Notice of Violation is issued only one month after the County had approved the Quarry's reclamation plan.

4/21/99 – Site inspection by DOC, County and County consultants indicates that the site may not be in compliance with its reclamation plan; no revegetation test plots located, no test plot monitoring, and no soil testing sites were evident as reported in the County's previous Inspection Report on June 16, 1998. The Quarry is made aware of these findings.

1/09/01 – SMGB forced to obtain Court Warrants to conduct annual mine inspection.

5/18/01 – El Dorado County issues Cease and Desist Order to Quarry for violations of SMARA.

7/14/01 – SMGB issues Order to Comply to Quarry for violations of SMARA.

8/16/01 – SMGB issues Administrative Penalties to Quarry for failure to correct violations.

12/13/01 – SMGB issues Administrative Penalty to Quarry in the amount of \$18,000 plus \$500 per day for lack of financial assurance.

2/7/02 – SMGB conducts annual inspection after having to obtain a Court Warrant.

7/11/02 – SMGB issues Order to Comply to Quarry for violations of its reclamation plan and SMARA.

7/11/02 – SMGB issues a Cease and Desist Order to Quarry for operating without a financial assurance.

E. Degree of Culpability (*Personal knowledge and behavior*)

1. Could it be assumed that a reasonable person in that position would have known that documents or fees were due?
2. How long has the operator known that plans, reports, fees or financial assurances were due prior to the issuance of the penalty?
3. How much notice was given by the Department / Lead Agency ?

Analysis: The record clearly demonstrates that the operator has long known of the necessity to comply with its reclamation plan and of its violations of the reclamation plan. The Quarry has received multiple notices of these requirements since at least 1991, and attended numerous County and SMGB hearings regarding the requirements of compliance. The owner of this Quarry, also, operates another surface mine within the County, and has demonstrated knowledge of the requirements of SMARA regarding that operation, as well.

F. Economic Savings (*Financial or economic gains to self*)

1. Has the operator received a financial or economic benefit from avoiding SMARA requirements?
 - (a) Not preparing a reclamation plan (reclamation plan and CEQA).
 - (b) Not posting a financial assurance (actual value or paying premiums).
 - (c) Not securing local permits (permitting fees and inspection costs).
 - (d) Not paying annual reporting fees to Lead Agency and State.

EXECUTIVE OFFICER'S REPORT

2. What length of time has the operator enjoyed these economic savings. The extent of any economic savings realized by the operator may depend on the length of time the appellant has been out of compliance .

Analysis: The Quarry has enjoyed an economic and financial benefit from not being in compliance with its reclamation plan. The Quarry's costs to correct violations of the reclamation plan are not factored into the Quarry's product price, since no corrections were performed (specifically the highwalls have been over excavated, the depth of the Quarry floor has been exceeded, the Quarry has encroached upon a set back zone, erosion control and winterizing efforts have not been performed, no revegetation test plot program has been established and monitored). Other mine operators must factor into their product prices the costs of maintaining compliant operations.

G. Any Other Matters Justice May Require -- This criterion is necessary to ensure that "the quality of Justice / Mercy is not strained" in either direction.

SMARA has been in effect since 1976, and the requirements of AB 3551 (i.e. PRC §2207) have been in effect since 1990. Ignorance of the existence of these laws and their requirements may not make a reasonable argument; however, there may be other considerations that can be taken into account that may temper a decision.

1. Has the non-compliant mining operation caused, or have the potential to cause, serious property damage to neighboring lands, roads, or other community facilities; or cause irreparable damage to the environment if left to operate as is; or threaten the safety or health of humans?
2. How truthful is the appellant in his/her petition? Does the argument for appeal seem reasonable and logical, supported by documented facts, or is the appellant trying to obfuscate facts or events?
3. What is the culpability of the lead agency in allowing the continuance of a non-complying operator. Although the operator ultimately must bear full responsibility for his/her operation and its effects, what steps did the lead agency take to encourage or discourage compliance?
4. Has the operator truly made "good-faith" efforts to comply, or continually missed deadlines for compliance? Has the operator repeatedly ignored direct warnings from the lead agency or from the Department?
5. Have unforeseen and unavoidable personal circumstances delayed or prohibited the operator from complying fully?

Analysis: Based on the evidence, the Executive Officer believes with respect to the criteria cited above:

(1) The noncompliance of the Quarry with its reclamation plan has potential to bring long term harm to neighboring properties and the natural environment, and to create a safety hazard to humans.

(4) The Quarry has not performed "good faith" efforts to come into compliance or correct the noticed violations. On the contrary, the Quarry has continually demonstrated an intentional disregard for the law and refusal to act in a positive fashion to correct deficiencies or mitigate its long history of noncompliance.

Criteria (2), (3), and (5) not applicable.

EXECUTIVE OFFICER RECOMMENDATIONS: In light of the failure of the Quarry to correct the violations of the approved reclamation plan, the Executive Officer recommends the following administrative penalties be approved by the SMGB for the following specific violations. According to PRC §2774.1 (c), orders setting administrative penalties become effective upon issuance. The maximum amount per day per violation authorized in statute is \$5,000 per day.

Violation 1 -- Over-excavation of the highwalls has occurred in at least two locations along portions of the east highwall and along portions of the south highwall.

Penalty Amount of \$10,000 to commence from September 12, 2002, which is the effective date of the Order to Comply, and an additional \$10,000 every 30 days thereafter until the Quarry completes correction of the over excavation of the highwalls to the satisfaction of the SMGB, or demonstrates through the use of a slope stability analysis acceptable to the SMGB that the highwalls are stable in their current configurations. The Quarry was advised to re-evaluate the slope stability in light of significant water seepage, variable rock types and structural integrity, documented slope failures along the walls, and the over- excavation of the slopes configurations that will prevent reclamation of the Quarry walls to their approved final design without encroachment into established setback areas.

Violation 2 -- The Depth of the excavation exceeds that presented in the approved Reclamation Plan;

Penalty Amount of \$10,000 to commence from September 12, 2002, which is the effective date of the Order to Comply, and an additional \$10,000 every 30 days

EXECUTIVE OFFICER'S REPORT

thereafter until the Quarry completes correction of the over excavation of the Quarry floor to the SMGB's satisfaction, or provides mitigation of the situation through reclamation plan amendments acceptable to the SMGB. The Quarry has been aware of the over deepening since February 2001, and has taken no actions to remediate the situation.

Violation 3 -- The west highwall has undergone slope failures, and no additional geologic mapping or slope stability analysis have been performed to further address this unstable area.

Penalty Amount of \$10,000 to commence from September 12, 2002, which is the effective date of the Order to Comply, and an additional \$10,000 every 30 days thereafter until the Quarry completes correction of the over excavation of the west highwall to the satisfaction of the SMGB, or demonstrates through the use of a slope stability analysis acceptable to the SMGB, that the west highwall is stable in its current configuration. The Quarry was advised to re-evaluate the slope stability in light of significant water seepage, variable rock types and structural integrity, and documented slope failures along the walls.

Violation 4 -- There has been an encroachment of the mining operation on the order of 30 feet into established setback areas along Cedar Ravine Road and along Quarry Road.

Penalty Amount of \$5,000 to commence from September 12, 2002, which is the effective date of the Order to Comply, and an additional \$5,000 every 30 days thereafter until the Quarry completes correction to the satisfaction of the SMGB of the encroachment into the 100 feet setback from the center of Cedar Ravine Road. This correction may be accomplished by obtaining agreements with El Dorado County to accept a lesser setback distance from the center of Cedar Ravine Road and amendments to the reclamation plan acceptable to the SMGB.

Violation 5 -- No revegetation test plot program is currently established.

Penalty Amount of \$10,000 to commence from September 12, 2002, which is the effective date of the Order to Comply, and an additional \$10,000 every 30 days thereafter until revegetation test plots are established to the satisfaction of the SMGB and a monitoring program can be documented. No established revegetation test plots were found during the inspection.

Violation 6 -- Failure to implement sediment erosion control and winterizing efforts.

Penalty Amount of \$1,000 to commence from September 12, 2002, which is the effective date of the Order to Comply, and an additional \$1,000 every 30 days thereafter until the requirements of Condition of Approval 11 are met that require topsoil areas to be seeded annually prior to the onset of the winter season for erosion control.

ACTIONS OF THE BOARD: The SMGB may accept the analysis, findings, and recommendations of the Executive Officer and determine to issue the Order for Administrative Penalty in the amounts recommended by the Executive Officer, or modify those recommendations and determine to issue an Administrative Penalty with different amounts and conditions. Or, the SMGB may determine to not issue any or all of the Administrative Penalties.

SUGGESTED MOTION LANGUAGE:

Motion to accept the Executive Officer's recommendations and issue the Administrative Penalty as set forth:

Mr. Chairman, I move that the Board approve of the analysis, findings, and recommendations contained in the Executive Officer's Report and that the Board, acting as lead agency with authority provided under PRC §2774.1, approve the issuance of the Administrative Penalty in the amounts recommended in the Executive Officer's Report. The Administrative Penalty is to become effective on this date.